Supreme Court, U.S.
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No. 96-681

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In The

Supreme Court of the United States

October Term, 1996

CATHY H. GREER, HALL & EVANS, L.L.C.,

Petitioners,

vs.

HONORABLE JOHN L. KANE, JR., in his official capacity as United States District Court Judge for the District of Colorado,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether an attorney's refusal to enter into a dual representation for both individual and official claims under 42 U.S.C. § 1983 could be an ethical violation for impermissibly limiting the scope of representation of a client when the individual and official capacity claims are targeted against different legal personages or clients?

2. Should the ethical rules relating to conflict of interest for multiple representation or the limitation of representation govern whether an attorney should enter into dual representation of individual and official capacity claims in litigation under 42 U.S.C. § 1983?

LIST OF PARTIES TO THE PROCEEDING

In light of the procedural history of this case, other parties not appearing in the caption of this petition were parties to the proceedings below. The petitioners are the attorney and law firm disqualified by the trial court judge in a federal civil rights action involving public employees, an elected official and a county.The plaintiffs below were Tammie Johnson, Elizabeth York, Judy O'Connor and Patricia Caudill. The Defendants below were Board of County Commissioners of Fremont County and Bob Cheek in his official and individual capacity. After the underlying federal civil rights litigation was settled by the parties, petitioners appealed their disqualification from the case to the Tenth Circuit Court of Appeals. Plaintiffs entered an appearance in the Court of Appeals as appellees even though all matters had been settled. They are deemed nominal respondents because they filed a brief in the Court of Appeals urging that the order of disqualification was appropriate.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit has been published at 85 F.3d 489 (10th Cir. 1996). The,decision of the United States District Court for the District of Colorado has been published at 868 F. Supp. 226 (D. Colo. 1994).

STATEMENT OF JURISDICTION

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was issued on June 4, 1996, and a Petition for Rehearing was timely filed and was denied on July 30, 1996.

This Court has jurisdiction to entertain this Petition for Certiorari pursuant to the provisions of 28 U.S. C. § 1254(1) and Supreme Court Rule 13(3).

STATUTE AND RULE INVOLVED

This case involves the ethical responsibilities of defense attorneys representing public entities and individual defendants under 42 U.S.C. § 1983 in conjunction with Colorado Rules of Professional Conduct Rule 1.2(c). That rule specifies: "A lawyer may limit the objectives of the representation if the client consents after consultation." 42 U.S.C. § 1983 provides:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This Petition for Certiorari seeks this Court's review of the Tenth Circuit Court of Appeals' finding that an attorney who represented an individual defendant in his official capacity in connection with a claim under 42 U.S.C. § 1983 engaged in unethical conduct by violating Rule 1.2 of the Colorado Rules of Professional Conduct.

The plaintiffs below were Tammie Johnson, Elizabeth York, Judy O'Connor and Patricia Caudill. The Defendants below were Board of County Commissioners of Fremont County and Bob Cheek in his official and individual capacity. Plaintiffs filed their original complaints in November 1993.[1] Plaintiffs' claims were brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. The only named defendant in plaintiffs' original complaints was the Board of County Commissioners for the County of Fremont.

Plaintiffs subsequently amended their Complaints to add

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1. Each of the plaintiffs below commenced separate civil actions which were consolidated for pre-trial purposes by the court into case number 94-K-2465. The trial court and subsequently the Court of Appeals dealt with the disqualification and representation issues on a consolidated basis.

Bob Cheek, the then Fremont County sheriff, in his official capacity, as an additional defendant. Cathy H. Greer, Esq., of Hall & Evans, L.L.C., answered on behalf of Bob Cheek in his *official* capacity.

On June 17, 1994, six weeks after the deadline for amending the pleadings pursuant to the parties' Scheduling Order, plaintiffs filed a Motion for Leave to File a Second Amended Complaint. Plaintiffs' Second Amended Complaint added as a defendant Bob Cheek in his *individual* capacity and also added a claim pursuant to 42 U.S.C. § 1983. Plaintiffs alleged that Bob Cheek's actions were taken "both inside and outside the scope of his authority." Without affording defendants the opportunity to respond to plaintiffs' Motion to Amend, the Court granted plaintiffs' Motion for Leave to Amend their Complaint on the same day the motion was filed, June 17, 1994.

Ms. Greer answered plaintiffs' Second Amended Complaint on behalf of defendant Bob Cheek in his official capacity as Sheriff of Fremont County. Bob Cheek, in his *individual* capacity, moved for an extension of time to file an answer to plaintiffs' Second Amended Complaint. The district court granted Mr. Cheek's Motion for Extension of Time to and including September 16, 1994.

Mr. Cheek in his individual capacity subsequently filed a second Motion for Extension of Time to file his answer in his *individual* capacity. Mr. Cheek's motion was denied on September 19, 1994. In its minute order denying Mr. Cheek's motion, the district court ordered Ms. Greer to show cause why pleadings filed on behalf of Mr. Cheek should not be stricken and "under what legal authority Ms. Greer presumes to enter a limited appearance on behalf of a party of record."

By Minute Order dated September 27, 1994, the court set for hearing all pending motions and the response to order to show cause. On October 2, 1994, Bob Cheek, in his individual capacity and *pro se,* filed an Answer to the Second Amended Complaints.

Ms. Greer responded to the district court's show cause order, articulating the rationale more fully discussed below regarding the distinction between representation of Mr. Cheek in his official capacity and representation of Mr. Cheek in his individual capacity.

On October 19, 1994, the district court conducted a hearing with respect to all pending motions. At this hearing, Theodore S. Halaby, Esq., of the law firm of Halaby & McCrea, attempted to enter his appearance on behalf of Mr. Cheek in his individual capacity.

The district court struck the appearances of both Ms. Greer and Mr. Halaby, and held that Mr. Cheek be required either to represent himself, or to be represented in both capacities by one attorney. In a subsequent written published opinion, the district court concluded that Ms. Greer's representation of Mr. Cheek in his official capacity violated Rule 1.1 of the Colorado Rules of Professional Conduct by not competently or zealously representing her client. *See Johnson v. Board of County Commissioners,* 868 F. Supp. 1226 (D. Colo. 1994). The underlying litigation was subsequently settled by the parties and dismissed with prejudice.

The Tenth Circuit Court of Appeals found that the trial court's underlying assumption, that the individual and official capacity defendants were one client, was in error. The Circuit Court, however, affirmed the trial court's disqualification on the basis that Ms. Greer impermissibly limited the scope of her

representation without client consent under Rule 1.2(c) of the Colorado Rules of Professional Conduct (C.R.P.C.) because the record did not adequately disclose that Ms. Greer had consulted with Mr. Cheek about the mechanics of § 1983 and the exposure he was facing in his individual capacity. The petitioners filed a Petition for Rehearing and alternatively suggested for a Rehearing En Banc. The Tenth Circuit denied the petition.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT COURT OF APPEALS, IN AFFIRMING THE DISQUALIFICATION OF MS. GREER, IMPROPERLY ASSUMED THAT AN INDIVIDUAL SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITY UNDER 42 U.S.C. § 1983 CONSTITUTES ONE CLIENT WHO CANNOT BE REPRESENTED IN ONLY ONE CAPACITY WITHOUT PRIOR CONSENT, AND ERRONEOUSLY RELIED UPON AN INAPPLICABLE ETHICAL STANDARD.

The Tenth Circuit's decision below conflicts with decisions of other federal courts that analyze ethical restraints of dual representation in § 1983 litigation, conflicts with this Court's treatment of individual and official capacity claims in § 1983 litigation and sanctions a significant departure from the usual and accepted course of judicial proceedings that the exercise of this Court's supervisory powers is required.

The Court of Appeals' ruling affirming the disqualification of Ms. Greer and her law firm ignores the fact that personal and official capacity claims against public officials are essentially claims against different defendants and different clients,

thereby making C.R.P.C. 1.2(c) inapplicable. In failing to recognize this distinction, the Tenth Circuit's ruling is in direct conflict with the longstanding holdings of this Court which have resolved that official and individual capacity claims under § 1983 target different defendants. The rule enunciated by the Court of Appeals creates a conflict between Rule 1.7(b) of the Colorado Rules of Professional Conduct and Rule 1.2(c) and creates an extreme departure from how conflicts of interest for purposes of joint representation have been analyzed by other circuits.

This Court has not hesitated to review appellate decisions involving the propriety of attorney discipline or sanctions stemming from federal court litigation. *See In Re Snyder*, 472 U.S. 634 (1985); *In Re Sawyer*, 360 U.S. 622 (1959). The instant writ provides this Court the opportunity to provide necessary direction to lower courts in their assessment of and proceedings for the evaluation of dual representation of public entities and public officials in § 1983 litigation.

While the Court of Appeals correctly acknowledged that a suit against a public official in his "official capacity" is a suit against an entity and not against the official personally, its finding that Ms. Greer violated Rule 1.2(c) is predicated upon the faulty premise that the official and individual capacity claims against Mr. Cheek are only aimed at one client. In fact, this Court has acknowledged that claims against officials in their official and individual capacities are "treated as the transactions of two different legal personages." *Bender v. Williamsport Area School D.*, 475 U.S. 534, 543, n.6, (1986). In *Bender*, the Court illustrated one aspect of the individual-official capacity distinction for federal civil rights litigation when it held that an individual school board member did not have standing to pursue an appeal of a case where he was sued in his official capacity. Consequently, this Court found that the

Court of Appeals in *Bender* did not have subject matter jurisdiction over a trial court judgment. *See also Hafer v. Melo*, 502 U.S. 21 (1991) (differentiating official and individual capacity claims for Eleventh Amendment immunity purposes); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

In finding that Ms. Greer violated Rule 1.2(c) of the Colorado Rules of Professional Conduct (C.R.P.C.), the Court of Appeals adopted the same faulty premise as the trial court in failing to recognize that the official capacity and individual capacity claims involved different defendants and clients. C.R.P.C. 1.2(c) restricts a lawyer from limiting a lawyer's representation of *a* client in terms of the subject matter of representation or of certain claims in litigation. The rule indicates that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." The comment section of that rule further defines how a lawyer may limit the objectives of representation for purposes of Rule 1.2(c) of the C.R.P.C. as follows:

> The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage.

As the language of C.R.P.C. 1.2(c) implies, that section applies

to circumstances where a lawyer somehow limits the scope of his representation of a single client to certain subject matter and/or claims. *See, e.g., Florida Bar v. Dingle*, 220 So. 2d 9 (Fla. 1969); *Delta Equipment and Construction Co. v. Royal Indemnity Co.*, 186 So. 2d 454 (La. App. 1966); *Young v. Bridwell*, 20 Utah 2d 332, 437 P.2d 686 (1968); Hazard, *The Law of Lawyering* 2nd Ed., § 1.2:400.

In contrast, Ms. Greer's representation of Mr. Cheek in defense of only his official capacity claims cannot violate Rule 1.2 because the panel decision erroneously assumes that official and individual capacity claims are asserted against the one client. The Court of Appeals could only apply Rule 1.2 if Ms. Greer agreed to represent him on some of the official capacity claims, but not others leaving Mr. Cheek allegedly exposed on non-represented claims. As discussed above, given the Court of Appeals' acknowledgment that official capacity claims are claims against the entity, not the individual, the panel's decision is internally inconsistent. The record below does not disclose any compromise or limitation on Ms. Greer's representation of Mr. Cheek in his official capacity. Instead, the panel erroneously assumes that Ms. Greer's failure to represent and/or advise Mr. Cheek in his individual capacity, a separate defendant, violates C.R.P.C. 1.2(c). The Court of Appeals' fundamental error in its analysis flies directly in the face of *Bender*, *Hafer* and *Graham, supra*. Despite its acknowledgment of *Bender* and *Graham*, the Court of Appeals disregarded these holdings in assuming that the official capacity and individual capacity claims were asserted against one client.

The Court of Appeals' analysis also constitutes a substantial deviation and conflict with the standard used by other federal courts in similar circumstances. Since representation of official capacity claims involves a different

client than an individual capacity claim, the appropriate ethical rule for analyzing whether or not a lawyer can accept representation of both claims is C.R.P.C. 1.7(b) or its equivalent, such as Code of Professional Responsibility, D.R. 5-105(B). *See Dunton v. County of Suffolk*, 729 F.2d 903, 908 (2nd Cir. 1984); *Shadid v. Jackson*, 521 F. Supp. 87 (E.D. Tex. 1981); *Clay v. Doherty*, 608 F. Supp. 295 (D.C. Ill. 1985). C.R.P.C. 1.7(b) provides in pertinent part:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> 1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> 2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and the risks involved.[2]

Rule 1.7(b)(2) specifically applies where there is multiple party representation by an individual lawyer in a single matter. C.R.P.C. 1.7(b) prohibits multiple representation unless a lawyer objectively believes that he can adequately represent multiple parties *and* obtains consent. If the lawyer reasonably

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2. As the Committee comments to C.R.P.C. indicate, C.R.P.C. 1.7 is virtually identical to Rule 1.7 of the Model Rules of Professional Conduct adopted by the American Bar Association.

believes that multiple representation cannot be had, the need for a lawyer to consult with both or all of the clients to obtain consent prior to withdrawal is greatly diminished. In fact, as C.R.P.C. 1.7(c) acknowledges, there are some circumstances where the client could not validly agree to joint representation. In such cases, consent would be futile.

The panel's application of C.R.P.C. 1.2(c) to the instant scenario creates an irreconcilable tension with C.R.P.C. 1.7(b) in that under the former rule consultation is required while under the latter consultation is not required for purposes of representing a public official in only one capacity. In fact, the panel's application of Rule 1.2(c) to the instant scenario is unprecedented and presents an extreme departure from Rule 1.7(b) as the appropriate standard. *See Dunton, supra*; *Shadid, supra*; *Clay, supra.*

Under the circumstances of this case, Ms. Greer was presented with an irreconcilable conflict if she were to represent Mr. Cheek in his defense of the official and individual capacity claims. The plaintiffs' second amended complaint asserted new claims against defendant Cheek, alleging acts both within and without the scope of his employment in allegedly sexually harassing the plaintiffs in violation § 1983. Consequently, to the extent that the plaintiffs below could prove that Cheek was acting outside of the scope of his employment, the official capacity defendant would be claiming that Cheek's actions did not occur pursuant to a municipal custom, policy or practice. *See Dunton, supra*. The conflict between the official capacity and individual capacity defendant was not simply hypothetical, but imminent. *Dunton, supra* (finding that defense counsel's assertion that his client acted outside the scope of his employment as a police officer required disqualification from representation of both the county and the police officer). Due to the irreconcilable conflict created by the

second amended complaint, C.R.P.C. 1.7(c) required separate representation and precluded the ability to obtain prior consent from Mr. Cheek. The Court of Appeals' decision completely ignores the applicability of C.R.P.C. 1.7 and the analysis utilized by all the federal courts who have addressed this issue. Moreover, it censures Ms. Greer for her attempts to comply with Rule 1.7 and her ethical obligations under this rule.

While the Tenth Circuit's decision below does not mandate separate representation for governmental and individual defendants with potential conflicts, it does illustrate the conflicting approaches of the courts who have dealt with this issue. The Tenth Circuit's approach is consistent with the Seventh and Fourth Circuits who do not require disqualification of attorneys representing both governmental entities and their employees where a potential conflict exists. *See Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Richmond Hilton Associates v. City of Richmond*, 690 F.2d 1086 (4th Cir. 1982).

In contrast, other courts have found that the dual representation of a municipality with an individually named defendant creates an inherent conflict requiring disqualification. In *Dunton, supra*, the Second Circuit created a near absolute prohibition on dual representation because it felt that an inherent conflict of interest was created by this Court's decision in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). The *Dunton* decision did not distinguish between potential or actual conflicts. Similarly, in *Shadid, supra*, a federal district court held that the potentially adverse interest of a City and an employee require disqualification of the lawyer representing both.

While the Court of Appeals' concern that defense attorneys do not abandon a public official's individual exposure at the expense of the entity is both well intentioned and valid, it is,

however, not applicable to the facts of the instant case. Unlike most cases involving conflicts of interest and subsequent disqualifications of counsel, *see, e.g., Dunton, supra; Kounitz v. Slaatten*, 901 F. Supp. 950 (S.D.N.Y. 1995), Ms. Greer never undertook dual representation only to later abandon one of her clients. Instead, Ms. Greer took the more conservative and cautious approach of representing only one client so that the individual capacity defendant could be separately represented.[3] In fact, the trial court's and the Court of Appeals' concerns for the unrepresented individual capacity defendant were unnecessary as separate counsel had sought to enter his appearance on behalf of Mr. Cheek prior to Ms. Greer's disqualification. Consequently, while the instant case provides a good opportunity for this Court to announce a consistent and workable procedure for defining and addressing potential conflicts of interest in § 1983 litigation for purposes of Rule 1.7(b), the panel's conclusion that Ms. Greer violated C.R.P.C. 1.2(c) is a drastic and unwarranted departure from the appropriate ethical standard for such situations which creates a Hobson's choice for public entity attorneys.

The affirmance of Ms. Greer's disqualification is particularly unjust because the Court of Appeals found that Ms. Greer failed to adequately demonstrate that she had consulted with Mr. Cheek. The Court of Appeals essentially placed the burden of demonstrating valid consent upon Ms. Greer when the prior state of the law did not recognize that Rule 1.2 was the appropriate standard to analyze such situations. To compound the inequity, Ms. Greer was only on notice to show cause why she should not be disqualified for entering a limited appearance under Rule 1.1 at the hearing. The absence of any attorney-client discussions about the need for separate representation is

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3. In fact, Ms. Greer's actions are consistent with the Tenth Circuit's own instruction that the individual capacity defendant be advised of the appropriateness of separate counsel. *See Johnson, supra*, 85 F.3d at 494.

better explained by the lack of any notice that consent was an issue rather than the inference of lack of consent or knowledge of potential or actual conflicts.

Finally, no matter which ethical standard is appropriate, the Tenth Circuit's newly enunciated procedure for ensuring that all parties are fully informed of the potential conflicts of interest creates inherent difficulties for governmental defendants and their counsel. Under this decision, the Court of Appeals now requires the trial court to ensure that the government defendant is fully informed of the potential for conflict after consultation by defense counsel. Absent an *in camera* proceeding, such a task is fraught with the danger of placing governmental defendants in a situation where strategic attorney-client communications may be divulged in open court in order to satisfy the Court of Appeals mandate. Any disclosure about potential conflicting defenses involves sensitive discussions about the applicability of certain defenses in light of the facts known to the client and defense counsel. Given the Tenth Circuit's mandate that district court judges ensure that public entity defendants "fully understand the potential conflict," it is difficult to conceive of how this task can be accomplished without disclosing sensitive attorney-client communications to the trial judge.

The above analysis demonstrates the significant flaws and problems with the Court of Appeals decision. Without this Court's review, § 1983 defendants and their counsel will be left with an unworkable and legally unsound decision in an area of the law that is already fraught with considerable uncertainty.

CONCLUSION

In light of the foregoing, petitioners request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and subsequently reverse the decision below.

Dated: October 28, 1996.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN CASE NUMBER 95-1075 DATED JULY 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-1075

TAMMIE JOHNSON, ELIZABETH YORK, JUDY O'CONNOR, PATRICIA CAUDILL,

Plaintiffs-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF FREMONT; BOB CHEEK, in his official capacity,

Defendants,

CATHY GREER, THE LAW FIRM OF HALL & EVANS,

Movants - Appellants.

ORDER
Entered July 30, 1996

Before BRORBY and BARRETT, Circuit Judges, and BRIMMER*, District Judge.

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* Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

Appendix A

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

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APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN CASE NUMBER 95-1075 FILED JUNE 4, 1996

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 95-1075

TAMMIE JOHNSON, ELIZABETH YORK, JUDY O'CONNOR, PATRICIA CAUDILL,

Plaintiffs-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF FREMONT; BOB CHEEK, in his official capacity,

Defendants.

CATHY GREER, THE LAW FIRM OF HALL & EVANS,

Movants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Nos. 93-K-2465, 93-K-2466, 93-K-2467 and 93-K-2468)

Submitted on the briefs:

Richard C. LaFond, Terry Clausen, and Arnold M. Woods, of LaFond & Clausen, L.L.C., Denver, Colorado, for Plaintiffs-Appellees.

Appendix B

Cathy H. Greer, Alan Epstein, and Josh Marks, of Hall & Evans, L.L.C., Denver, Colorado, for Movants-Appellants.

Before **BRORBY** and **BARRETT,** Circuit Judges, and **BRIMMER,*** District Judge.

BRORBY, Circuit Judge.

Attorney Cathy Greer and the law firm of Hall & Evans appeal from an order finding that Attorney Greer violated the Colorado Rules of Professional Conduct by representing defendant Bob Cheek in his official capacity only. We affirm, although we apply a different analysis than the district court.[1]

I. Factual & Procedural Background

Mr. Cheek was at all relevant times sheriff of Fremont County, Colorado. While Mr. Cheek was serving as sheriff, four female employees of the Fremont County Sheriff's Department commenced actions against the Board of County Commissioners for the County of Fremont, claiming Mr. Cheek had sexually harassed them in violation of Title VII of the Civil Rights Act of 1964. The board answered, stating it had no legal responsibility for actions of the sheriff's department.

Plaintiffs filed amended complaints adding Mr. Cheek as a defendant to their Title VII claims. The caption listed Mr.

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* The Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

1. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Cheek as a defendant in his official capacity. Attorney Greer answered on behalf of Mr. Cheek in his official capacity as sheriff of Fremont County. On June 17, 1994, plaintiffs filed second amended complaints adding a claim under 42 U.S.C. § 1983, and naming Mr. Cheek as a defendant in both his official and individual capacities. These complaints alleged that Mr. Cheek's actions were taken "both inside and outside the scope of his authority." Mr. Cheek filed answers in his official capacity, asserting as a defense that "[t]he actions complained of by plaintiff[s] were not taken pursuant to any official custom[,] policy or practice."

On July 29, 1994, Mr. Cheek in his individual capacity and pro se, moved for an extension of time to answer because he was seeking declaratory relief from state court to determine whether the Board of County Commissioners would provide counsel to represent him in his individual capacity. The district court granted the extension.

On September 16, 1994, because the state court had not yet ruled, Mr. Cheek moved for a second extension of time to file an answer in his individual capacity. The district court denied the motion and ordered Attorney Greer to "show cause in writing . . . why all pleadings filed on behalf of Mr. Cheek should not be stricken and under what legal authority [she] presumes to enter a limited appearance on behalf of a party of record."

Attorney Greer filed a response. She explained that there is a distinction between individual and official capacity suits in that in an official capacity suit, the real party in interest is the governmental entity whereas in an individual capacity suit, liability is sought to be imposed against the individual governmental officer. She stated there are two separate

defendants — the government entity that employs Mr. Cheek (Mr. Cheek in his official capacity), and Mr. Cheek in his individual capacity. Further, as of January 1995, a successor to Mr. Cheek would be elected who would then hold the office of sheriff and be represented by counsel.

On October 3, 1994, Mr. Cheek, appearing pro se, answered the second amended complaints in his individual capacity. He adopted all of the assertions in the answer filed by Attorney Greer, and added the additional affirmative defense of qualified immunity with respect to the claim for relief under § 1983.[2]

On October 19, 1994, Attorneys Theodore Halaby and Robert Liechty attempted to enter appearances for Mr. Cheek in his individual capacity. At the hearing held that day, the district court struck all entries of appearances, including Attorney Greer's, and gave Mr. Cheek an additional thirty days to answer the second amended complaint, either pro se or with an attorney or attorneys representing him in both his capacities.

In a subsequently issued published decision, the district court stated that, although a person may be sued in more than one capacity, that did not mean an attorney may limit his or her appearance to only one of those capacities. *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1230 (D. Colo. 1994). Reasoning that a party with an attorney of record may appear only through that attorney, the district court determined that by entering an appearance on behalf of Mr. Cheek in his official capacity, Attorney Greer precluded him from appearing pro se

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2. Mr. Cheek later admitted to the district court that the documents he filed in his individual capacity and pro se, although signed by him, were ghostwritten by the Fremont county attorney.

or from retaining other counsel for the individual capacity claims. *Id.* at 1230. The court concluded that by representing Mr. Cheek only in his official capacity, Attorney Greer left him exposed on the claims against him in his individual capacity and therefore violated Colorado Rules of Professional Conduct, Rule 1.1, which requires that a lawyer "provide competent representation to a client." *Id.* at 1231. While the court recognized that Colorado Rules of Professional Conduct, Rule 1.2(c) permits a lawyer to "limit the objectives of the representation if the client consents after consultation," it noted a client may not be asked to agree to representation so limited in scope as to violate Rule 1.1. *Id.*

In reaching its conclusion Attorney Greer had not satisfied her obligations under the Colorado Rules of Professional Conduct, the district court also made the following findings:

> It is not clear who has requested Greer to represent Cheek. The record is silent on this matter. There is no indication that Cheek, whom Greer ostensibly represents, has demanded that his representation be bifurcated. . . .
>
> It is clear, however, that Greer has been instructed by someone not appearing before the court to represent Cheek only insofar as he holds the official title of sheriff of Fremont County. . . .
>
> . . . .
>
> While Greer consulted with Cheek to

> obtain his consent to such limited representation is not apparent on the information of record.

Id. at 1230-31.[3]

The attorneys filed a petition for writ of mandamus challenging the order. We denied the petition. *Cheeks v. Kane*, No. 94-1524 (10th Cir. Nov. 29, 1994). The parties settled the underlying action, and the cases were dismissed with prejudice. The attorneys then filed this appeal. We ordered the parties in this appeal to submit briefs addressing whether the appeal should be dismissed as moot based on the settlement of the underlying action.

II. Analysis

A. Mootness

We will dismiss an appeal as moot if it is impossible for this court to grant the appellant any effectual relief whatsoever. *In re Material Witness Warrant Nichols*, 77 F.3d 1277, 1279 (10th Cir. 1996).

We held in *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990), that a sanctions order against an attorney currently of record is not immediately appealable as a final judgment where the underlying controversy is unresolved. Further, such an order is not appealable under the collateral

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3. The court was also critical of the practice of attorneys ghostwriting for pro se litigants. However, Attorney Greer did not engage in that conduct, and this aspect of the court's ruling is not at issue in this appeal.

order exception to the final judgment rule because it could be appealed by the attorney at the conclusion of the underlying case, even if the parties settle or elect not to appeal. *Id.* at 827-29.

In *United States v. Dickstein*, 971 F.2d 446 (10th Cir. 1992), we addressed whether an attorney who no longer was involved in the underlying action because his pro hac vice status had been revoked could take an immediate appeal from the revocation order, even though the underlying case had been concluded. We held the attorney could not because the order was not a final judgment. *Id.* at 448. Further, because the attorney was seeking an appeal only to vindicate his reputation, rather than to be allowed to continue representing his client, we saw no reason why the order could not effectively be reviewed on appeal from the final judgment. *Id.* at 451. Even the former client's acquittal would not render the revocation order unreviewable at the conclusion of the underlying case. *Id.* Thus, the order was not appealable under the collateral order exception to the final judgment rule. *Id.*

These cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.[4] We therefore conclude the appeal is not moot insofar as the district court's order found that Attorney Greer had violated the Colorado Rules of Professional Conduct. *See Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1370 (11th

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4. An attorney would lack standing to challenge the order insofar as it affected only his or her client's rights. *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993).

Cir. 1989) (holding challenge to order disqualifying attorney was not moot, despite dismissal of underlying case, where order's "brand of disqualification" on grounds of dishonesty and bad faith could hang over attorney's name and career for years). That the underlying cases were dismissed pursuant to a stipulation for dismissal with prejudice has no effect on the attorneys' right to appeal because they were not parties to the stipulation. *Cf. Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 526 (10th Cir. 1992).

B. Merits

Attorney Greer contends separate legal representation is required where there are claims against a public official in both his official and individual capacities that create a potential for conflicting defenses.

When a governmental official is sued in his official and individual capacities for acts performed in each capacity, those acts are "treated as the transactions of two different legal personages." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) (internal quotation marks omitted). Thus, a person sued in his official capacity has no stake, as an individual, in the outcome of the litigation. *Id.* at 543-44. Personal or individual capacity suits "seek to impose personal liability upon a government official for actions he takes under color of state law," while an official capacity suit is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotation marks omitted). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity," and not as a suit

against the official personally, "for the real party in interest is the entity." *Id.* at 166.

The distinctions between suits against an official in his individual and official capacities give rise to differing and potentially conflicting defenses. Most notably, the government entity could defend itself by asserting that the official whose conduct is in question acted in a manner contrary to the policy or custom of the entity. *See id.* at 166. Also, an individual capacity defendant could assert the defense of qualified immunity. *See Dunton v. County of Suffolk,* 729 F.2d 903, 907 (2d Cir.) (explaining potential conflicts between defenses of municipality and its employees in § 1983 action).

Given the potential conflict between the defenses available to a government official sued in his individual and official capacities, we have admonished that separate representation for the official in his two capacities is a "wise precaution." *Medina v. Housing Auth. of San Miguel County,* No. 91-2094, 1992 WL 218990 at *3 (10th Cir. Sept. 4, 1992) (unpublished order and judgment). Although we did not hold that the potential for conflict mandates separate representation, we did hold it was not in error to allow separate representation. *Id.* at *4. While some courts have held separate representation is required in the face of the potential conflict, *see e.g., Ricciuti v. New York City Transit Auth,* 796 F. Supp. 84, 88 (S.D.N.Y. 1992); *Shadid v. Jackson,* 521 F. Supp 87, 90 (E.D. Tex. 1981), we decline to adopt a per se rule. We hold that when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities. *See Silva v. Witschen,* 19 F.3d 725, 732 (1st Cir. 1994); *Richmond Hilton*

Assocs. v. City of Richmond, 690 F.2d 1086, 1089 (4th Cir. 1982); *Clay v. Doherty,* 608 F. Supp. 295, 303 (N.D. Ill. 1985). Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required. *See Dunton,* 729 F.2d at 907-08; *Clay,* 608 F.Supp at 303; Model Rules of Professional Conduct, Rule 1.7.

Though separate representation is permissible, an attorney may not undertake only the official capacity representation at his or her sole convenience. Under Colorado Rules of Professional Conduct, Rule 1.2(c), a lawyer may limit the objectives of her representation only "if the client consents after consultation." In the case where an attorney has been hired to represent a government official in only his official capacity in a suit where the official is also exposed to liability in his individual capacity but has no representation in that capacity, this rule serves an important function. When adhered to properly, the rule ensures the defendant is adequately informed about the workings of 42 U.S.C. § 1983 and the potential conflict between the defenses he may have in his separate capacities. Above all else, the attorney and the district court should ensure the official is not under the impression that the official capacity representation will automatically protect his individual interests sufficiently. Courts have recognized a "need for sensitivity" to the potential for conflict in this area, and have advised that "[t]he *bar* should be aware of potential ethical violations and possible malpractice claims." *Gordon v. Norman,* 788 F.2d 1194, 1199 n.5 (6th Cir. 1986) (quotation omitted). In the service of these interests, we embrace the Second Circuit's procedure whereby counsel notifies the district court and the government defendant of the potential conflict, and the government defendant is permitted to choose joint representation. *See Kownitz v. Slaatten,* 901 F. Supp. 650,

659 (S.D.N.Y. 1995). In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim. We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.

In the instant case, the district court found:

> It is not clear who has requested Greer to represent Cheek. The record is silent on this matter. There is no indication that Cheek, whom Greer ostensibly represents, has demanded that his representation be bifurcated . . .
>
> It is clear, however, that Greer has been instructed by someone not appearing before the court to represent Cheek only insofar as holds the official title of Sheriff of Fremont County . . . .
>
> . . . .
>
> Whether Greer consulted with Cheek to obtain his consent to such limited representation is not apparent on the information of record.

Johnson, 868 F. Supp. at 1230-31.

Our review of the record confirms these observations. The district court concluded Attorney Greer "left Cheek exposed on those claims which can be sustained against him in his

individual capacity." *Id.* at 1231. Given that Attorney Greer has not demonstrated that she consulted with Mr. Cheek about the mechanics of § 1983 and the exposure he was facing in his individual capacity or brought the matter to the district court's attention, we are not prepared to hold the district court erred in its finding Attorney Greer failed to satisfy her obligations to Mr. Cheek.

The decision of the district court is **AFFIRMED,** but the reasoning and analysis in *Johnson,* 868 F. Supp. 1226, are disapproved to the extent they conflict with our opinion.

APPENDIX C — MEMORANDUM, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED NOVEMBER 17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-K-2465

TAMMIE JOHNSON, ELIZABETH YORK, JUDY O'CONNOR and PATRICIA CAUDILL,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF FREMONT; and BOB CHEEK, in his official and individual capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

KANE, J.

The four plaintiffs in this consolidated civil action brought claims of sex discrimination against the defendants. They allege that Defendant Bob Cheek, who was the Sheriff of Fremont County, subjected them to sexual harassment while they were employed either as dispatchers or, in the case of Plaintiff Caudill, as a deputy sheriff. The complaints of the several plaintiffs are replete with allegations of lurid and tasteless comments, obscenities and nonconsensual physical

contacts. This memorandum opinion does not deal with the merits of the factual allegations, but rather with fundamental questions concerning in attorney's obligations to represent a client fully and to appear before the court with candor. Because of a lack of clearly defined precedents, sanctions are not imposed even though inappropriate conduct by counsel is found.

A hearing was held on all pending motions on October 19, 1994. At that time I stated I would follow my bench ruling with a memorandum opinion because these issues seriously affect the administration of justice, attention needs to be drawn to them and they appear to be arising with increasing frequency. These issues include so-called limited appearances by counsel and ghost-writing pleadings and briefs by counsel for purportedly *pro se* litigants.

At this memorandum opinion describes in laborious detail, the delay and confusion occasioned in this case by the conduct of various attorneys is extraordinary. Having accommodated to the point of dalliance the various requests of attorneys acting on behalf of or in the person of the Defendant Cheek to delay his obligations to appear and defend, I issued an order to show cause why all pleadings filed on behalf of Defendant Cheek should not be stricken and under what legal authority Cathy H. Greer, Esq. presumed to enter a limited appearance on behalf of a party of record. Also pending were Defendant Cheek's motion for reconsideration of my minute order dated September 19, 1994, Plaintiffs' motion to allow the deposition of Defendant Cheek after the discovery cut off date and Defendants' motion to allow the depositions of Caudill, York and Gary O'Connor after that date.

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At the October 19 hearing, I found no cause had been shown and struck the appearance of Greer in this case. I denied all pending motions as moot and rejected the attempt of Messrs. Halaby, Cross, Liechty, Schluter and Buck to enter their limited appearance as counsel for Defendant Cheek in his individual capacity. This memorandum opinion follows.

I. *Background*

In December 1993, Plaintiffs commenced these consolidated actions against the Board of County Commissioners for the County of Fremont. On January 28, 1994, I granted Plaintiffs' motion to amend their complaints to add as a new party Sheriff Bob Cheek in his official capacity. Plaintiffs asserted claims against the Board and Cheek in his official capacity pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17.

On February 4, 1994, Edward G. Rodgers, District Attorney for the Eleventh Judicial District, State of Colorado, requested appointment of a special prosecutor to represent Cheek in this action and an extension of time in which Cheek could file an answer to the complaints. On February 7, 1994, I granted the motion to extend the time for filing an answer up to and including March 7, 1994 but denied the motion to appoint a special prosecutor.[1]

On March 2, 1994, Rodgers filed a further motion for extension of time in which to file an answer. He stated an

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1. I stated this is a federal and not a state court and the cited statute, Colo. Rev. Stat. § 20-1-107, does not apply. This is a civil case in which Cheek is a defendant and no special prosecutor is needed.

attorney, David Zook, had been appointed to represent Cheek effective March 7, 1994 when Zook would return to Colorado from Louisiana. I granted an extension of thirty days in which Cheek could file an answer. Mr. Zook did not enter an appearance as suggested.

On April 6, 1994, Cathy H. Greer, Esq. of the law firm of Hall and Evans, representing Bob Cheek in his official capacity as Fremont County Sheriff, requested an extension of time until April 13, 1994 within which to respond to Plaintiffs' first amended complaint. Greer stated she had just been retained and had not yet had an opportunity to discuss the case with Cheek. I granted the extension.

On April 13, 1994, Greer filed an answer of Bob Cheek to the first amended complaint of each Plaintiff. Each answer stated Cheek was answering "in his official capacity as Sheriff of Fremont County" and was signed by Greer of Hall and Evans, "Attorneys for Defendant Bob Cheek."

On June 17, 1994, Plaintiffs filed a motion for leave to file a second amended complaint and to extend the discovery deadline. I granted this motion and extended the discovery deadline to September 28, 1994. Each Plaintiff's second amended complaint includes a claim for relief under 42 U.S.C. § 1983 and seeks punitive damages against "Defendant Cheek in his individual capacity."

On July 29, 1994, Bob Cheek, "in his individual capacity and *pro se*" requested an extension of time to file an answer to the second amended complaint. As Cheek confirmed at the time of the hearing, this and other documents allegedly filed by him in such capacity were ghost-written by Fremont County

Attorney Brenda Jackson. Cheek asserted he was seeking declaratory relief from the District Court of Fremont County, Colorado, to determine whether the Board of County Commissioners of Fremont County would provide counsel to represent him in his individual capacity. On August 1, 1994, in deference to the state action, I granted the extension to September 16, 1994.

On August 2, 1994, Greer, of Hall and Evans, "Attorney for Defendant Bob Cheek," filed an answer of "Bob Cheek in his Official Capacity" to each Plaintiff's second amended complaint. On September 16, 1994, Cheek, "in his individual capacity and *pro se* requested an additional extension of time to file his answer to the second amended complaint. Cheek stated the District Court of Fremont County, Colorado was scheduled to rule on his motion for declaratory judgment on September 26, 1994.

On September 19, 1994 I denied Cheek's motion because he had failed to comply with Local Rule 7.1A which requires a moving party, before filing a motion, to confer with opposing counsel to resolve the disputed matter. I further ordered Greer to show cause in writing on or before October 3, 1994 why all pleadings filed on behalf of Cheek should not be stricken and under what legal authority Greer presumed to enter a limited appearance on behalf of a party of record.

On September 21, 1994, Greer as "Attorney for Defendant Bob Cheek in his official capacity as Sheriff of Fremont County" requested an extension of the deadline to respond to certain discovery requests "until such time as counsel representing Defendant Cheek in his individual capacity would have an opportunity to become familiar with this case." On September 22, 1994 I denied the request.

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On September 21, 1994, Greer filed a response to the order to show cause. She recounted the only claims in the original complaints were pursuant to Title VII and such claims could only be asserted against an individual in his official capacity. She stated such claims were in effect a suit against the entity or office held by the individual, rather than against the individual himself. She maintained in this case the Title VII claim was against the "Office of the Sheriff of Fremont County (Bob Cheek in his official capacity)," that on October 1, 1993, Cheek had been suspended from his office of sheriff, that he would not run for re-election, that a successor would be duly elected to replace Cheek as sheriff in January 1995 and that thereafter the official represented by Greer would be someone other than Cheek.

On September 26, 1994, Cheek "in his individual capacity and *pro se*" filed another ghose-written motion for reconsideration of my minute order dated September 1994 and requested the answer date be extended to October 3, 1994. Attached to the motion is a certificate of compliance pursuant to D.C. Colo. L.R. 7.1(a), stating that, through Fremont County Attorney Brenda Jackson, Cheek had conferred with Plaintiffs' counsel who indicated he had no objection to the extension.

On September 27, 1994, I set all pending motions and the response to order to show cause for hearing on October 19, 1994, ordering all counsel of record and Cheek to be present.

On September 27, 1994, Plaintiffs filed a motion to allow the deposition of Cheek after the discovery cutoff date (September 28, 1994), within thirty days after the receipt of Cheek's responses to written discovery requests submitted on August 23, 1994. Plaintiffs' counsel explained that my

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September 22, 1994 denial of Cheek's counsel's motion for extension of time to respond to discovery requests in effect denied the request to allow Plaintiffs to take Cheek's deposition within thirty days after the receipt of Cheek's discovery responses.

On September 28, 1994, Defendants "Bob Cheek, in his official capacity, and Board of County Commissioners for the County of Fremont" filed a motion to allow the depositions of Plaintiffs Patricia Caudill and Elizabeth York and Gary O'Connor, former acting sheriff of Fremont County, after the discovery cutoff.

On September 29, 1994, I notified the parties that all pending motions would be considered at the hearing on October 19, 1994.

On October 3, 1994, Cheek "in his individual capacity and *pro se*" filed an answer to each of the second amended complaints. In it, he "realleges and adopts the assertions contained in his answer prepared and filed by Cathy H. Greer, Esq. of Hall & Evans as his answer in his official capacity" and asserts an additional affirmative defense of qualified immunity to the second claim for relief under 42 U.S.C. § 1983. This pleading, too, was obviously drafted by a lawyer.

On October 19, 1994, the date of the hearing, Theodore S. Halaby and Robert M. Liechty of the law firm of Halaby, Cross, Liechty, Schulter & Buck filed an entry of appearance "as counsel for defendant Bob Cheek, in his individual capacity" which I rejected.

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II. *Entry of a "Limited Appearance."*

Greer was ordered to show cause why all pleadings filed on behalf of Cheek should not be stricken and under what legal authority Greer presumed to enter a limited appearance on Cheek's behalf. The order was entered pursuant to a court's inherent power to control and supervise proceedings before it. *See United States v. Carrigan,* 804 F.2d 599, 603 (10th Cir. 1986). " '[D]eeply rooted in the common law tradition is the power of any court to "manage its affairs [which] necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.' " *Malautea v. Suzuki Motor Co.,* 987 F.2d 1536, 1545 (11th Cir.), *cert. denied,* 114 S. Ct. 181 (1993) (quoting *Carlucci v. Piper Aircraft Corp.,* 775 F.2d 1440, 1447 (11th Cir. 1985)) (citation omitted).

In her response to the order to show cause, Greer persists in asserting that she represents Cheek in his official capacity, but not his individual capacity. She cites *Hafer v. Melo,* 112 S. Ct. 358, 361-62 (1991) which outlines the distinctions between individual (personal) and official capacity suits. In an official capacity suit, the named official is merely the agent of the governmental entity which is the real party in interest. *Id.*

An individual capacity suit seeks to impose liability on the named "government officer for actions taken under color of state law." *Id.* at 362. There is no grammatical or rhetorical ambiguity presented. In either event, it is the individual who must answer and defend. In an official capacity suit, the governmental entity achieves the status of a real party in interest because it is subject to vicarious liability based on the acts or omissions of the named government officer. This does

not mean that the individual person who is the government officer ceases to exist or that his office, which might not be a suable entity, is substituted for him as the party litigant.

Greer provides no authority in support of her claimed entrance of a limited appearance on behalf of a party of record.[2] "An appearance is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction. . . . It is an affirmative act requiring knowledge of the suit and an intention to appear." *Anderson v. Taylorcraft Inc.*, 197 F. Supp. 872, 874 (W.D. Penn. 1961).

The distinction between an appearance on behalf of an individual named in a law suit and the capacities in which that individual is sued apparently escapes Greer. A person may be sued in more than one capacity in a single lawsuit. This does not mean an attorney may limit his or her appearance on behalf of that person to one of the capacities in which the individual is sued.

> A party to an action may appear therein in his own proper person or by attorney but cannot do both. . . . A party having an attorney of record in an action must be heard in court through such attorney and the court

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2. The reference to "limited appearance" should not be confused with the term "special appearance." Formerly a technical distinction existed between general and special appearances. A party could enter a special appearance for the purpose of objecting by motion to the jurisdiction of the court, the venue of the action or an insufficiency of process or service of process. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1344 (1990). However, technical distinctions between general and special appearances have been abolished. *Id; see* Fed. R. Civ. P. 12.

> has no power or authority of law to recognize anyone in the conduct or disposition of the case except the attorneys of record therein.

Endresse v. Van Vleet, 169 P.2d 719, 720 (Mont. 1946); *see* 6. C.J.S. *Appearances* § 9 (1975). Greer, in entering an appearance on behalf of Cheek, precluded Cheek from appearing therein *pro se* or from retaining other counsel on his behalf. By attempting to represent Cheek to defend only those causes of action on which he may be liable in his official capacity, Greer leaves Cheek undefended for the remainder.

The account of the events leading up to my order to show cause reflects a web of motions and requests for extensions arising out of Greer's purported entry of an appearance on behalf of Cheek only in his official capacity. As noted, "[t]he public interest demands a seemly and efficient use of judicial resources towards the just, speedy, and inexpensive remedy spoken for in Fed. R. Civ. P. 1 . . . the court should *sua sponte* raise ethical problems involving danger to a just speedy and inexpensive remedy, even if the parties do not." *Schmidt v. Ford Motor Co.*, 112 F.R.D. 216, 221 (D. Colo. 1986).

Greer's attempt to represent Cheek only in part raises a serious ethical question, namely, who is the client? It is not clear who has requested Greer to represent Cheek. The record is silent on this matter. There is no indication that Cheek, whom Greer ostensibly represents, has demanded that his representation be bifurcated. Were he to make such a request, it would be denied summarily. A litigant can either fish or cut bait.

It is clear, however, that Greer has been instructed by

someone not appearing before the court to represent Cheek only insofar as he holds the official title of Sheriff of Fremont County. Whatever phantom is calling this tune, however, may not have it played in this court.

"[T]he application of the Code of Professional Responsibility is a part of the court's general supervisory authority to ensure fairness to all who bring their cause to the judiciary for resolution." *Greenbaum-Mountain Mortgage Co. v. Pioneer Nat. Title Ins. Co.*, 421 F. Supp. 1348, 1351 (D. Colo. 1976). "A district court is obliged to take measures against any unethical conduct occurring in connection with any proceeding before it." *Schmidt v. Ford Motor Co.*, 112 F.R.D. at 220. "[A]ll federal courts have the power, by statute, by rule, and by common law, to impose sanctions against recalcitrant lawyers and parties litigant." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d at 1446.

Rule 1.1 of the Colorado Rules of Professional Conduct provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Colo. Rules Professional Conduct 1.1.[3] "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law." *Id.*

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3. The Local Rules of Practice provide: "The rules of professional conduct, as adopted by the Colorado Supreme Court, are adopted as standards of professional responsiblity applicable in this court." D.C. Colo. LR 83.6. The Colorado Supreme Court adopted the Colorado Rules of Professional Conduct effective January 1, 1993.

R. 16(1). "A lawyer may limit the objectives of the representation if the client consents after consultation." *Id.*, R. 1.2(c). However, "[a]n agreement concerning the scope of representation must accord with the Rules of professional Conduct and other law. Thus the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1." Cmt. Colo. Rules Professional Conduct 1.2.

Whether Greer consulted with Cheek to obtain his consent to such limited representation is not apparent on the information of record. However, even if Cheek's consent was obtained, the scope of such representation violates Colorado Rules of Professional Conduct 1.1. By purporting to represent Cheek only insofar as claims exist against him in his official capacity, Greer left Cheek exposed on those claims which can be sustained against him in his individual capacity. This is not competent or zealous representation as envisaged by Rule 1.1. and has, moreover, led to this significant waste of judicial resources described above.

Greer and her firm are welcome to represent Cheek in this action. So, too, Halaby and Liechty and their firm can enter as co-counsel fully sharing in the responsibility for Cheek's representation. Neither of them, however, can create the absurd situation of representing one metaphysical Cheek and not the other.

III. *Ghostwriting for a Pro Se Litigant.*

Cheek confirmed at the hearing that the documents he filed "in his individual capacity and *pro se*," although signed by him, were drafted by Fremont County Attorney Brenda Jackson. Such ghost-writing is far more serious than might appear at first

blush. It necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results.

It is elementary that pleadings filed *pro se* are to be interpreted liberally. *Haines v. Kerner,* 404 U.S. 519, 520 (1972); *Swoboda v. Dubach,* 992 F.2d 286, 289 (10th Cir. 1989). Cheek's pleadings seemingly filed *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party.

Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.

> What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it

> must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.

Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971); *see also Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702-3, (S.D.N.Y. 1971); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970). Such an evasion of the obligations imposed upon counsel by statute, code and rule is *ipso facto* lacking in candor.

The ABA Standing Committee on Ethics and Professional Responsibility has stated that an undisclosed counsel who renders extensive assistance to a *pro se* litigant is involved in the litigant's misrepresentation contrary to Model Code of Professional Responsibility DR 1-102 (A) (4), which provides: "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978). Similarly, such conduct will not be countenanced because it is contrary to Colorado Rule of Professional Conduct 1.2(d) which provides "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.

Appendix C

IV. *Conclusion.*

Because no just cause has been shown, the appearance of Greer in this case is STRICKEN. For the reasons stated in this memorandum opinion, the entry of appearance for Cheek in his individual capacity by Theodore S. Halaby and Robert M. Liechty is REJECTED. Cheek now appears *pro se*. On October 19, 1994, he was given thirty days in which to answer the amended complaints either appearing *pro se* or by counsel, but not both. All pending motions are deemed MOOT and DENIED. A scheduling conference will be held on Wednesday, December 7, 1994 at 9:00 a.m. If an answer is filed by then, discovery will be expedited and a firm trial date set.

A judge is constrained by Canon 3 of the Code of Conduct for United States Judges to initiate appropriate action when he or she becomes aware of the likelihood of unprofessional conduct by a lawyer. Having published this memorandum opinion is, in my view, sufficient appropriate action since I am confident that none of the offending conduct referred to was thought of as such by the lawyer or lawyers involved. Further, the Rules of Professional conduct adopted by the Colorado Supreme Court and perforce by this court as well as existing ethics opinions of the Colorado Bar Association have not given adequate attention to the ethical considerations implicit in the practice of ghose-writing.

I have given this matter somewhat lengthy attention because I believe incidents of ghose-writing by lawyers for putative *pro se* litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to

which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghose-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.

Dated this 17 day of November, 1994 at Denver, Colorado.

s/ John L. Kane, Jr.
JOHN L. KANE, JR.
U.S. SENIOR DISTRICT COURT JUDGE